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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 178

DEPEW PAVING COMPANY, INCORPORATED,
Petitioner

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims granting the Government's motion for summary judgment (R. 27-35) is reported at 104 F. Supp. 94.

JURISDICTION

The judgment of the Court of Claims was entered on April 8, 1952 (R. 35). The petition for a writ of certiorari was filed on July 3, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims correctly applied the principle of *Fogarty* v. *United States,* 340 U. S. 8, in holding that a letter, accompanied by an invoice and recapitulation sheets, requesting additional payments pursuant to the terms of petitioner's contract with the Civil Aeronautics Administration did not constitute a written request for relief within the meaning of Section 3 of the Lucas Act so as to qualify petitioner for the extraordinary benefits provided by that statute.

STATUTE INVOLVED

Section 3 of the War Contract Hardship Claims Act, popularly known as the Lucas Act, adopted August 7, 1946, 60 Stat. 902, 41 U.S.C., Supp. V, 106, note, provides in pertinent part:

> Sec. 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six months after the date of approval of this Act [August 7, 1946], *and shall be limited to losses with respect to*

which a written request for relief was filed with such department or agency on or before August 14, 1945, * *.* [Emphasis supplied.]

STATEMENT

Petitioner, as a joint venturer with John B Schultz Contracting Company, Inc., entered into a government contract for the grading, draining and paving of an airport at Dunkirk, New York (R. 1-2). According to the allegations of the petition and certain exhibits filed in the court below, unusually heavy rains encountered during the execution of the contract resulted in extensive delays and caused losses on account of labor costs and idle equipment (R. 2, 37-38).

On August 18, 1944, petitioner wrote a letter to the Civil Aeronautics Administration concerning the performance of the contract and the losses allegedly suffered. Enclosed were an invoice billing the Government for $130,751.92 and recapitulation sheets setting forth the details of the claimed losses. (R. 37-39.) In pertinent part the letter read as follows:

> Gentlemen:
>
> Attached herewith please find invoice and recapitulation sheets showing the labor loss and Equipment loss as compared with the time the equipment was on the job and the time it was actually able to work, the loss being due to conditions not contemplated in Contract

No. Clca 1486 for construction of the Dunkirk Airport. The total loss amounting to $130,751.92.

* * * * *

In the execution of this Contract, we had in use equipment beyond what would be needed under normal conditions. The weather reports in your possession conclusively show that at no time during the execution of the Contract was there sufficient time between rains, to efficiently operate. Our proposal was predicated only on normal conditions, and there was no way for us to definitely know that we would experience continued wet weather.

The Contract existing between us entered into the 30th day of July, 1942, stipulates in Article 4, on Page 3, that relief for losses can be obtained for "unknown conditions of an unusual nature." For this reason we feel that we should be recompensed for not only our cash losses but for losses due to the necessity of prolonging the job beyond the time stipulated in the Contract. [emphasis supplied.]

* * * * *

On November 9, 1944, the Civil Aeronautics Administration sent a reply to the letter, denying the claim on the ground that it constituted a claim for damages which could not be settled by a contracting agency (R. 39-40).

On February 7, 1947, within six months after the passage of the Lucas Act, petitioner filed a claim for relief under the provisions of that Act with the Civil Aeronautics Administration for losses allegedly sustained in performance of the above-mentioned contract (R. 3). On December 24, 1948, the Civil Aeronautics Administration denied the claim for relief in its entirety on the ground that petitioner had not, prior to August 14, 1945, filed a written request for relief from losses within the meaning of Section 3 of the Lucas Act (R. 3, 5-6). Petitioner then instituted this suit in the Court of Claims.

At a pre-trial conference before a Commissioner of the Court of Claims two joint exhibits were received in evidence (R. 36-37). It was agreed that Joint Exhibit I, petitioner's letter of August 18, 1944 (R. 37-39), was the document relied upon by petitioner as the written request for relief filed prior to August 14, 1945, and that Joint Exhibit II (R. 39-40) was the reply of the Civil Aeronautics Administration to that letter. Thereafter, the Court of Claims granted a motion for summary judgment filed by the Government and dismissed the petition, holding that petitioner had not, prior to August 14, 1945, filed a written request for relief within the meaning of Section 3

of the Lucas Act.[1] Two judges dissented, believing that on the documents before them there was sufficient doubt whether petitioner's letter constituted such a request so as to justify a trial on the merits.

ARGUMENT

1. Like *Simpson et al.* v. *United States*, pending on petition for a writ of certiorari, No. 49, this Term, this case presents the narrow question whether the Court of Claims correctly applied the principle of *Fogarty* v. *United States*, 340 U. S. 8, to the particular facts of this case. As in *Simpson*, we submit that the Court of Claims correctly applied that principle in holding that petitioner's letter of August 18, 1944, and the accompanying invoice and recapitulation sheets, did not constitute a written request for relief within the meaning of Section 3 of the Lucas Act.

In the *Fogarty* case, *supra*, this Court considered the question whether a claim for compensation for requisitioned property and a number of invoices seeking compensation for goods and services allegedly furnished, all of which had previously been submitted to the Navy Department, constituted written requests for relief within the

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[1] In addition to this ground, adopted by the court below, the Government also urged in support of its motion (R. 9) that an audit filed pursuant to former Rule 18 of the court showed that petitioner had actually realized a profit on the contract involved.

meaning of Section 3 of the Lucas Act. In its opinion in that case this Court said (340 U. S. 8, 13):

> * * * we think Congress intended the term "written request for relief" to mean written notice presented prior to August 14, 1945, to an agency which was authorized to grant relief under § 201 of the First War Powers Act. Since there is no definition of the term in the Act or regulations, and since the legislative history of the Act does not show that any settled usage of the term was brought to the attention of Congress, no particular form of notice is required. *But whatever the form of notice, it must be sufficient to apprise the agency that it was being asked to grant extra-legal relief under the First War Powers Act for losses sustained in the performance of war contracts.* [Emphasis supplied.]

Petitioner's letter of August 18, 1944 (R. 37-38), does not seek extra-legal relief under the First War Powers Act or any other relief as a matter of grace. The letter makes no reference to the First War Powers Act, and it contains no language of supplication. It was accompanied by an invoice for $130,751.92, which is hardly a prayer that the grace of a sovereign be exercised. After outlining the difficulties encountered in performance of the contract and the losses allegedly incurred, the letter

directs attention to the provision made in Article 4 of the contract for relief from losses sustained on account of "unknown conditions of an unusual nature." *"For this reason"* (emphasis supplied), the letter continues, "we feel that we should be recompensed not only for our cash losses but for losses due to the necessity of prolonging the job beyond the time stipulated in the Contract." No request for relief outside the terms of the contract is contained in the letter.

However, there apparently is no contention that the letter of August 18, 1944, was intended as a request for extra-legal relief under the First War Powers Act (Pet. 8-10). No suggestion is made that the Civil Aeronautics Administration misinterpreted the letter nor, so far as it appears from the pleadings and evidence, did petitioner attempt to have its claim reconsidered on other than contractual grounds. Instead, petitioner and the dissenting judges below appear to argue that, because the claim was without legal foundation, the Civil Aeronautics Administration should have known that the only relief available was extra-legal and accordingly treated the claim as a request for relief under the First War Powers Act. No sound reason is advanced to support this conclusion that Government officers were to be vigilant in distributing public funds as gratuities to those who failed

to request them.[2] Extravagant claims by contractors are not necessarily claims for equitable or extra-legal relief nor are they unknown in Government contracting offices. And it is neither a necessary nor a fair inference that all men who mistakenly suppose they have contractual rights would want to file a claim for extra-legal relief or would believe they were entitled such relief under the first War Powers Act. Such a decision is one properly left to the contractors. Petitioner's suggestion to the contrary, that the burden of selecting the appropriate avenue for relief should be placed on the Government, was correctly rejected by the Court of Claims on the authority of this Court's decision in *Fogerty* v. *United States, supra,* that the written request for relief required by Section 3 of the Lucas Act "*must be sufficient to apprise the agency* that it was being asked to grant extra-legal relief *under the First War Powers Act* * * * " (emphasis supplied). 340 U. S. at 13. Indeed, the attempt to substitute constructive notice on the part of a government officer for the

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[2] Petitioner's argument is based upon an assumption that contracting officers have information readily available concerning all avenues of relief for disappointed contractors; it ignores the administrative necessity of processing a multitude of varying claims through specialized channels of Government agencies.

Furthermore, the case of *Arundel Corp.* v. *United States,* 103 C. Cls. 688, on which petitioner relies as establishing that its claim was without legal foundation (Pet. 8), was not decided until May 7, 1945, six months after the Civil Aeronautics Administration had rejected the claim (R. 39).

written request for relief required of contractors seeking the extraordinary benefits of the Lucas Act flies in the teeth of the clear and specific limitation of Section 3 itself.

2. There is no conflict. Petitioner claims that the decision in this case conflicts with the decisions of the Court of Claims in *Howard Industries, Inc.* v. *United States,* 113 C. Cls. 231, and *Simpson, et al.* v. *United States,* 102 F. Supp. 562. However, the decision of the Court of Claims in *Howard Industries, Inc., supra,* was issued prior to this Court's decision of the *Fogarty* case, and, as the portion of the opinion quoted in petitioner's brief (Pet. 11) shows, it can no longer be considered as an accurate statement of the law or controlling as a Court of Claims precedent. *Simpson, et al.* v. *United States, supra,* petition for a writ of certiorari pending, No. 49, this Term, is fully in accord with the decision in this case in holding that, viewing the documents as a whole, a claim for additional compensation under Articles 3 and 4 of a standard government construction contract, and an appeal taken from the contracting officer's decision, did not constitute a written request for relief within the meaning of Section 3 of the Lucas Act, despite an express request for "an equitable adjustment." In this respect, this Court's attention is respectfully invited to the Government's brief in opposition in the *Simpson* case.

Although there may be disagreement within the court below as to whether petitioner's letter of August 18, 1944, was sufficient to apprise the Civil Aeronautics Administration that it was being asked to grant extra-legal relief under the First War Powers Act,[3] there is no conflict with other decisions of the Court of Claims nor has the court departed from the principle laid down in this Court's decision in *Fogarty* v. *United States, supra.* Under these circumstances, review by this Court is manifestly not warranted.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT L. STERN,
Acting Solicitor General.

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

SAMUEL D. SLADE,
CORNELIUS J. PECK,
Attorneys.

SEPTEMBER, 1952.

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[3] Petitioner does not claim that it is entitled to a trial of the issue of whether it filed a proper "written request for relief," or that the granting of summary judgment was erroneous for that reason.

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